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No. 02-1188 (2)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

E.K. McDANIEL, Warden, Ely State Prison;
JACKIE CRAWFORD, Director, Nevada Department of Prisons;
BRIAN SANDOVAL, Attorney General of the State of Nevada, Petitioners,

v.

JOHN ESPIREDION VALERIO, Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, John Espiredion Valerio, asks leave to file the attached opposition to a petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Counsel for respondent was appointed by the United States District Court for the District of Nevada under 18 U.S.C. § 3006A and 21 U.S.C. § 848(q). See Supreme Court Rule 39.1.

Dated this 17th day of March, 2003.

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For the District of Nevada

MICHAEL PESCETTA
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Counsel for Respondent

21 pp

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED
[CAPITAL CASE]

1. When a Court of Appeals

   (1) follows this Court's uniform precedents, which hold that the adequacy of a state procedural bar to preclude federal review is a federal question, and

   (2) concludes, based on its review of the terms of the state court's published and unpublished decisions that the state court's imposition of its procedural bars is discretionary and not based on "clear, consistently applied and well established" rules that actually bind the court's actions,

   can granting certiorari be justified merely because a state court decision asserts that its past decisions consistently applied procedural rules?

2. When a Court of Appeals resolves procedural issues relating to abuse of the writ and procedural default, and concludes that review of the merits of some constitutional claims is not precluded, and some of those claims may be unexhausted, is the Court of Appeals required to ignore this Court's decision in Granberry v. Greer, 481 U.S. 129 (1987), which grants discretion to review petitions that are discovered to be mixed petitions on appeal, and to refuse to review any claims?

3. When a state appellate court in a weighing state upholds a death sentence despite a finding of an unconstitutional depravity aggravating factor, but the court does not conduct reweighing or harmless error review, as required by Richmond v. Lewis, 506 U.S. 40 (1992), Stringer v. Black, 503 U.S. 222 (1992), and Clemons v. Mississippi, 494 U.S. 738 (1990), can granting certiorari be justified to review the Court of

Appeals' decision vacating the sentence based on that factor?

4. When a Court of Appeals reverses a judgment in a habeas proceeding and remands for further proceedings, is it absolutely precluded from resolving a constitutional claim relating to the penalty phase solely because further proceedings on guilt phase issues may occur in the district court?

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Respondent John Valerio submits the following brief in opposition to the petition for writ of certiorari filed by the petitioners representing the State of Nevada. Respondent accepts the characterizations made in the procedural sections of the state petition.[1]

STATEMENT OF THE CASE

Respondent John Valerio was sentenced to death in 1988 on the basis of findings of two aggravating factors under Nevada law, including a finding that the murder involved "torture, depravity of mind or mutilation of the victim." Nev. Rev. Stat. § 200.033(8) (emphasis supplied). The depravity portion of the aggravating factor was defined to the jury as "an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible and inhuman." The jury was not given any instruction defining torture or mutilation. CR 29, Ex. PP, instructions 7, 10. At trial, the prosecutor emphasized the depravity language of the instruction, and explicitly disclaimed any reliance on torture as a theory of the aggravating factor on the ground that there was no evidence of torture. CR 28, Ex. LL at 59-60.[2] Although Godfrey v. Georgia, 446 U.S. 420 (1986) had been decided two years before the trial, the unconstitutional vagueness of the depravity instruction was not objected to at trial or raised on direct appeal from the conviction and sentence. In the initial state habeas proceeding, the state district court rejected a

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[1] There are no parties to this proceeding other than those named in the caption, but the petitioners represent the interests of the State of Nevada.

[2] The killing was committed by multiple stab wounds, but there was no evidence suggesting that the fatal wounds were inflicted for the purpose of causing pain rather than accomplishing the homicide. The only medical testimony presented by the state indicated that the cumulative effect of all the stab wounds was the cause of death and that there was no conclusion as to the timing of the wounds. CR 27, Ex. FF at 200-201.

challenge to the depravity factor under Godfrey, ruling that, under Nevada Supreme Court authority, the instruction was constitutional, and that the case "involved" torture, without reference to the state's explicit abandonment of the torture theory at trial. On appeal from the denial of relief, the Nevada Supreme Court affirmed. It agreed with the state district court's ruling that the aggravating factor was constitutional, concluded that the depravity factor required a showing of "torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself" (emphasis supplied), and stated that the evidence showed the existence of "torture and/or serious physical abuse" (emphasis supplied). Respondent's Appendix A at 1 n.1. The court also ignored both the state's concession at trial that there was no evidence of torture and the evidence showing that the killing was accomplished by a combination of all of the stab wounds inflicted.

Following a second state habeas proceeding, in which the Nevada Supreme Court refused to review constitutional claims on procedural grounds, the federal district court reviewed respondent's habeas corpus petition and denied relief. A panel of the Court of Appeals initially affirmed the denial of relief, in part on procedural grounds relating to the certificate of appealability. The Court of Appeals granted rehearing en banc, and expanded the scope of the certificate of appealability to include all of the claims raised by respondent, an action of which the state does not complain in its petition for certiorari. The Court of Appeals reversed the district court's dismissal of some claims under the abuse of the writ doctrine, based on this Court's decision in Slack v. McDaniel, 529 U.S. 473 (2000); reversed the district court's dismissal of other claims on procedural default grounds, based on the inadequacy of the state default rule to bar federal review; and reversed the denial of relief as to the penalty, based on the invalidity of the depravity aggravating factor under Godfrey v. Georgia, 446 U.S. 420, 433 (1980). Valerio v. Crawford, 306 F.3d 742 (9th Cir. 2002)

en banc) The state now seeks certiorari.

REASONS FOR DENYING THE WRIT

1. This Court should not grant certiorari to review the Court of Appeals' unanimous en banc decision that the Nevada Supreme Court does not consistently apply its successive collateral petition default rule in capital cases: the Court of Appeals' decision properly follows the analysis required by this Court's precedents, and its conclusion is clearly correct.[3]

The Court of Appeals considered the adequacy of the Nevada Supreme Court's procedure in the analytical framework imposed by this Court's case law. 306 F.3d at 773, citing Johnson v. Mississippi, 486 U.S. 578, 587 (1988); Ford v. Georgia, 498 U.S. 411, 424 (1991); Coleman v. Thomson, 501 U.S. 725, 735 (1991). It concluded, as it had in the previous Petrocelli decision, that the Nevada successive petition rule was not consistently applied and therefore was not adequate to bar federal review. The court's review of the Nevada Supreme Court's decisions was exactly the kind contemplated by Johnson v. Mississippi, 486 U.S. at 587-588, and Dugger v. Adams, 489 U.S. 401, 410 (1989). The full argument on these issues made by the respondent is attached to this brief at Appendices C, E, A, D, G, pages 26-39, 72-91, 127-139.[4]

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[3] Neither the concurring nor dissenting opinions in the Court of Appeals case disagreed with the majority opinion on this issue. 306 F.3d at 779 (Fisher, J., concurring); id. (Rymer, J. dissenting). Judge Rymer, who wrote the dissenting opinion in this case, also concurred in a previous decision that reached the same result on this issue, Petrocelli v. Angelone, 248 F.3d 877, 892 (9th Cir. 2001), of which the state did not seek review on certiorari.

[4] The state argues that some inconsistency in application of default rules is tolerable, as long as the rules are applied in the "vast majority" of cases, relying on Dugger v. Adams. Respondent submits that this Court's decision in Village of Willowbrook in Olech, 528 U.S. 562, 564-565 (2000) (per curiam), casts considerable doubt on that principle: under Olech, inconsistent treatment of a single individual can violate the equal protection clause of the Fourteenth Amendment; and a state court's denial of relief to a capital petitioner on the basis of a procedural rule that it does not apply to similarly situated litigants would violated Olech. But

The state argues that certiorari should be granted because the Court of Appeals' decision conflicts with the decision in Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001), in which the Nevada Supreme Court asserted that it has applied default rules consistently. The state's argument ignores this Court's settled authority. The state courts have the responsibility to decide what state law is, a principle that respondent has always accepted. See, e.g., Lewis v. Jeffers, 497 U.S. 764, 780 (1990). But the adequacy of a state procedural ruling to bar federal review is "not within the State's prerogative finally to decide; rather, adequacy 'is itself a federal question.'" Lee v. Kemna, 534 U.S. 362, 375 (2002), quoting Douglas v. Alabama, 380 U.S. 415, 422 (1965). Thus while the Nevada Supreme Court in Pellegrini could determine what state law is, it could not re-interpret its previous default rulings in order to establish that, at the time of the alleged default in respondent's case, the rules were clearly established and consistently applied.[5] That is a determination which the federal court must make independently, as this Court did in Johnson v. Mississippi, Dugger v. Adams, and its other cases on this issue.[6]

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this point is not determinative, because the Nevada Supreme Court's decisions demonstrate that, in the class of successive collateral proceedings in capital cases, the application of the successive petition rule to bar claims is entirely unpredictable and often unexplained. The dispositions cited in respondent's briefing show that at least a quarter of the Nevada Supreme Court's dispositions in successive petition proceedings in capital cases either ignore the application of default rules altogether, or excuse non-compliance on grounds not applied consistently in other cases. This precludes any argument that the Nevada Supreme Court acts consistently in the "vast majority" of cases.

[5] The Nevada Supreme Court previously asserted, in respondent's own case, that it is not concerned with the question of consistent application of its default rules, because "arguments regarding the consistent or inconsistent application of a procedural bar are aimed at the federal courts rather than this court." Valerio v. State, 112 Nev. 383, 389, 915 P.2d 874 (1996).

[6] Respondent also notes that the state mischaracterizes the adequacy determination as a factual finding, Petition at 18-19, when it is in fact a legal conclusion drawn from the state court's decisions themselves.

The Court of Appeals also made its decision on the basis of all the published and unpublished collateral decisions of the Nevada Supreme Court in successive capital collateral proceedings, while the Pellegrini decision did not even acknowledge the existence of its unpublished dispositions. Further, even considering only the published dispositions, the Nevada Supreme Court routinely addresses the merits of claims without any explanation of why default rules were not applied, thus indicating that its default rules are purely discretionary. E.g., Bejarano v. Warden, 112 Nev. 1466, 1471 n.2, 929 P.2d 922 (1996) (unexplained review of merits of one claim after imposing default rules as to all other claims); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing merits of claim raised for first time on appeal on second collateral proceeding, while imposing defaults as to other claims); Hill v. State, 114 Nev. 169, 171, 953 P.2d 1077 (1998) (addressing merits of claim raised for first time on appeal in second collateral proceeding, based on power to consider constitutional issues raised for first time on appeal if record sufficient, without applying default rules applied to other claims); Bejarano v. State, 106 Nev. 840, 843, 801 P.2d 1388 (1990) (addressing issue of ineffective assistance sua sponte on appeal from denial of collateral relief); Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676 (1995) (same; court "choose[s]" to reach merits without resolving procedural default issues). In fact, the Pellegrini court found it necessary to overrule cases which indicated that more discretionary rules applied to imposition of defaults in capital cases and that imposition of defaults was general discretionary. 34 P.3d at 535-536. However the Nevada Supreme Court interpreted these cases in Pellegrini, the decisions themselves say what they say: the terms of the pre-Pellegrini Nevada Supreme Court decisions demonstrate its power to dispense with any default rule in its unfettered discretion. The Court of Appeals was completely correct in concluding that the Nevada successive petition default rule was

not adequate to bar federal review, and there is no basis for granting certiorari on this issue.

Petitioners attempt to manufacture a basis for granting certiorari which does not exist in this case, and which they have never previously raised, with respect to the burden of proving the inadequacy of a state procedural default ruling to bar federal review. Petition at 14-16. The petition itself acknowledges that the Court of Appeals did not address this issue, Petition at 16; but the state does not acknowledge that it never made any argument on this point to the Court of Appeals. See Respondent's Appendices D, F. This is therefore an entirely inappropriate case for consideration of this issue on certiorari under this Court's consistent precedents. E.g. Youakim v. Miller, 425 U.S. 231, 234 (1976); Delta Airlines v. August, 450 U.S. 346, 362 (1981).

Moreover, the inadequacy of Nevada's successive petition bar to preclude federal review had already been established before the decision in this case. In Petrocelli v. Angelone, 248 P.3d 877, 886-888 (9th Cir. 2001), the Court of Appeals held that Nevada's successive petition rule was not adequate to bar federal review because in capital cases it was not consistently applied and was discretionary. The state did not seek review of that ruling by the Court of Appeals en banc or by this Court on certiorari. The same rule was at issue in this case, and while the state argued that Petrocelli was wrongly decided, it made no argument with respect to the burden of proof. The reason for this is simple: the Nevada Supreme Court's decisions applying its procedural default rules have been thoroughly inconsistent and demonstrate that its application of procedural defaults has been entirely discretionary, and that conclusion is clearly supported wherever the burden of proof may be placed.

2. The Court of Appeals addressed the invalidity of respondent's sentence due to the unconstitutional depravity aggravating factor, although its reversal of the district court's judgment on procedural grounds will potentially allow the review of some substantive claims that were

arguably not exhausted. The state argues that this Court should grant certiorari on this issue, but it does not discuss, or even cite, this Court's decision in Granberry v. Greer, 481 U.S. 129, 134 (1987). In Granberry, this Court held that a Court of Appeals could determine, in its discretion, "whether the interests of justice would be better served by addressing the merits of the habeas petition" when the issue of non-exhaustion arises on appeal. The Court of Appeals addressed that question in its decision, 306 F.3d at 768-770, and the state does not discuss the Court's analysis at all. Respondent submits that this Court should take the state's failure to address this authority as a concession that the Court of Appeals followed this Court's authority in Granberry and that there is no basis for granting certiorari on this issue.[7]

The state also claims that the Court on Appeals' decision on the invalidity of the depravity aggravating factor is an advisory opinion, because further proceedings in the district court could result in invalidation of other parts of the facts of the judgment. The state did not attempt to make this argument to the court below, just as it did not make the exhaustion argument it now offers at any point in the briefing below, see Respondent's Appendices D, F, or in a petition for rehearing. Under these circumstances, this Court should decline to consider these issues. E.g. Delta Airlines v. August, 450 U.S. 346, 362 (1981). In any event, the state's argument is entirely general, and its reasoning would make virtually every routine opinion of this Court in which further proceedings are necessary into an advisory opinion. See, e.g., Powell v. Nevada, 511 U.S. 79, 84 (1994) (holding that delay in arraignment claim could not be barred by state retroactivity ruling without addressing

[7] Moreover, the state does not acknowledge that the litigation in the district court could obviate the exhaustion issue entirely: the state could waive exhaustion, the respondent could withdraw unexhausted claims, or the district court could reject unexhausted claims on the merits. See 28 U.S.C. § 2254(b)(2). Neither the state nor the dissenting judges in the Ninth Circuit addresses this point.

availability of any remedy if violation established). The state does not suggest that there is any conflict in the decisions of the Courts of Appeals, or any particular significance to this issue, or any extreme deviation from this Court's decisions, that would justify the devotion of resources to review on certiorari.

3. The Court of Appeals properly concluded that the unconstitutional depravity aggravating factor infected respondent's death sentence and that the Nevada Supreme Court's attempt to uphold the factor and the sentence was unavailing. There seems to be no dispute that the terms of the instruction defining depravity were unconstitutionally vague under Godfrey v. Georgia, 446 U.S. 420 (1986). CR 29, Ex. PP, instruction 10. There can also be no dispute on what the trial record shows: the prosecutor strongly argued the terms of the depravity definition to the jury; the state explicitly disclaimed any reliance on torture as an alternative theory of depravity, on the ground that there was no evidence of torture; the state's medical evidence indicated that death was caused by all the stab wounds; and there was no evidence that the perpetrator had any specific sadistic intent to cause pain, beyond accomplishing the killing (which is required to establish torture under Nevada law) or any intent to inflict mutilation beyond accomplishing the killing (which is required to establish mutilation under Nevada law). CR 27, Ex. FF at 200-201; CR 28, Ex. LL at 59-60. There is also no possible dispute that the state district court and the Nevada Supreme Court did not consider either the state's concession that torture was not present , or the absence of any evidence of intent to inflict torture or to inflict injuries beyond the act of killing, in light of the medical evidence. Respondent's Appendix A at 1 n.1.

The only issue in dispute is whether the Nevada Supreme Court's highly eccentric analysis, in its unpublished decision in respondent's initial collateral proceeding, salvaged the validity of the

aggravating factor and the sentence. The state does not argue that there is any conflict among the Court of Appeals on this issue, since there appears to be no state case in which an attempt has been made to avoid the effect of an invalid depravity factor in this way, nor does the state suggest that there is any national significance justifying review of the state court's idiosyncratic procedure in this case.

This Court's decision in Richmond v. Lewis, 506 U.S. 40 (1992), holds that "[a]t a minimum, we must determine that the state court actually reweighed . . . '[o]nly constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.' . . . [T]he state appellate court or some other sentencer must actually perform a new sentencing calculus, if the sentence is to stand." 506 U.S. at 47, quoting Stringer v. Black, 503 U.S. at 1137. In this case, there is no language in the Nevada Supreme Court's order remotely suggesting that it conducted a harmless error or reweighing analysis: the terms "harmless error," "weighing," and "reweighing" simply do not appear in the order.[8] The Court's "agreement" with the state district court that the killing "involved torture (or serious physical abuse)" Respondent's Appendix A at 1 n. 1 (emphasis supplied), does not suggest that the Supreme Court made any findings based on the evidence: the state district court did not, in fact, refer to "serious physical abuse" at all. Similarly, the Court's statement that the evidence "satisfies us" that the victim was subjected to "torture and/or serious physical abuse," id. (emphasis supplied) does not indicate that the Court actually made a finding that either of these factors was present. Most important, however, the last sentence of the Court's analysis does not suggest that any reweighing or harmless

[8] The Court of Appeals referred to the Nevada Supreme Court's application of a Walton analysis without acknowledging that it was doing so, 306 F.3d at 758, but this Court's precedents do not suggest that reweighing can be performed covertly.

analysis has taken place at all: the Court concluded "that the depravity of mind instruction in Mr. Valerio's case was not unconstitutionally vague as applied." Id. (emphasis supplied). That is not reweighing or harmless error analysis: it is simply the replacement of one theory of the aggravating factor by a different one, with no consideration of the effect of the unconstitutional factor on the jury's verdict or on the court's sentencing calculus[9]. This Court's decision in Stringer v. Black, 503 U.S. 222, 230-231 (1992) requires a reviewing court to conduct "a thorough analysis of the role an invalid aggravating factor played in the sentencing process [and] determine what the sentencer would have done absent the factor." In this case, the state emphasized the depravity definition to the jury; and a properly-instructed jury might well have rejected the factor altogether, since it rejected a charged robbery aggravating factor, and there was essentially no evidence to support a torture or mutilation theory of depravity(which the state conceded as to torture).

This absence of analysis is aggravated by the Court's reintroduction of the vague language of the original factor into this "narrowing" language ("serious and depraved physical abuse"); by the Court's failure to notice the state's concession on the torture issue at trial; by the Court's failure to address the state's medical evidence, which is inconsistent both with torture and with infliction of "physical abuse beyond the act of killing itself." Respondent's Appendix A at 1 n.1; 306 F.3d at 760.

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[9] In addition, under Nevada law the finding of an aggravating circumstance, and the weighing of aggravating against mitigating circumstances, establishes only eligibility for the death penalty, and a jury is never required to impose a death sentence even when eligibility is established. E.g., Bennett v. State, 111 Nev. 1099, 1109, 901 P.2d 676 (1995). The Court's order contains no discussion at all of the effect of the invalid depravity factor on the jury's ultimate decision as to the appropriate sentence, nor does it indicate that the Court itself conducted the ultimate sentencing calculus.

The Court of Appeals' decision explains why the Nevada Supreme Court's order cannot constitute adequate reweighing under Walton v. Arizona, 497 U.S. 738 (1990), since the original fact finding was made by a jury, and it correctly points out that the Nevada Supreme Court itself agrees with that position. 306 F.3d at 758, quoting Pertgen v. State, 110 Nev. 554, 562-563, 875 P.2d 361 (1994). The Court of Appeals also thoroughly discussed why the Nevada Supreme Court's order did not provide the kind of "close appellate scrutiny" of the effect of the invalid aggravating factor required by Stringer v. Black, 503 U.S. at 230, and its progeny. 306 F.3d at 759-762. But the main reason that certiorari should not be granted is that the terms of the Nevada Supreme Court's order are so confused that no useful precedent could be generated from analyzing its idiosyncratic inadequacy.

The other peculiarities of this case also militate against its use as a vehicle for deciding any constitutional issue. First, respondent has not been able to find any case in which a court has attempted to narrow a vague aggravating factor on a theory which the state has explicitly abandoned. If this Court were to grant certiorari to review this issue, it would have to conclude that the state's action violated the right to due process of law under the Fourteenth Amendment, however it decided the reweighing issue. See, e.g., Lankford v. Idaho, 500 U.S. 110, 126-127 (1991).

Second, the jury was instructed that Nevada's depravity factor would be established on three theories, depravity, torture, or mutilation, each in the disjunctive, and with a definition given only for depravity. A purported narrowing construction of the factor on appeal, and an appellate finding of torture or mutilation, is not a "narrowing" of the language given to the jury, but a replacement of one theory of establishing the factor with a completely different one. When, as here, the replacement factor is one that the state disavowed at trial, it is clear that the factfinding and the imposition of

sentence are being made by the appellate court. Even assuming arguendo that Ring v. Arizona, 536 U.S. 584 (2002) does not apply to this case (as the Court of Appeals did), Nevada has an explicit constitutional prohibition on appellate fact finding. Nev. Const. Art. 6 § 4 (jurisdiction of Nevada Supreme Court in criminal cases limited to "questions of law alone.") A purported finding of an alternate theory of aggravation by the Nevada Supreme Court would violate this express constitutional limitation, which would in turn deprive respondent of a liberty interest in violation of due process of law under the Fourteenth Amendment. E.g., Hicks v. Oklahoma, 447 U.S. 343, 346 (1980).

Third, the terms of the Nevada Supreme Court's order would not allow any federal court to conclude that adequate narrowing was actually conducted. The Court's conclusion was that the evidence showed "torture and/or serious physical abuse." The term "and/or" is intrinsically ambiguous, and it does not establish that the court in fact found either theory. This issue would have to be governed by Richmond v. Lewis, 506 U.S. 40, 50-51 (1992), in which this Court held that appellate review did not cure the effect of an unconstitutional depravity factor because a majority of the reviewing court did not agree on the theory of affirmance. Here, the Nevada Supreme Court's order is fatally ambiguous as to what theory, if any, the members of the court agreed upon.

In short, the inadequacy of this appellate review could be characterized as insufficiently "close appellate scrutiny" under Stringer, 503 U.S. at 230, as the Court of Appeals concluded, 306 F.3d at 759-762; but it could equally plausibly be found to be a complete absence of any sort of "actual" reweighing under Richmond. Whatever analytical approach is adopted, it is clear that the death sentence cannot stand. Accordingly, there is no basis upon which this Court should considering granting certiorari.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari.

DATED this 17th day of March, 2003.

Respectfully submitted,

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